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In the Supreme Court
OF THE
United States
OCTOBER TERM, 1942

No. [redacted] 76

DANT & RUSSELL, INCORPORATED,
Petitioner and Appellant,
vs.
BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. McDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. H. O'CONNOR,
County Counsel, In pro per.,
And as Counsel for Respondents.

GORDON BOLLER,
Deputy County Counsel,
Of Counsel.

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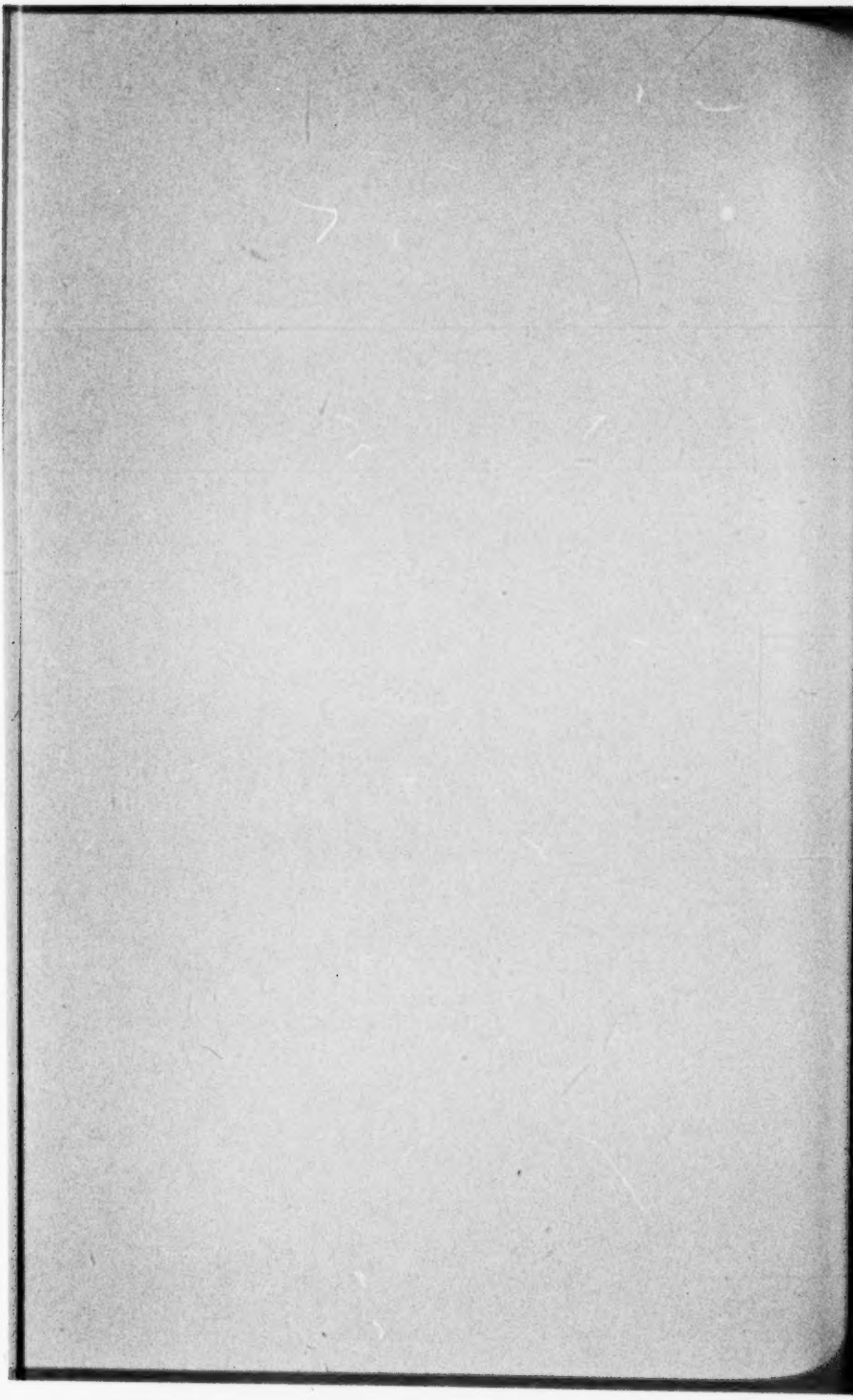

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OCTOBER TERM, 1942

No. 1059

DANT & RUSSELL, INCORPORATED,
Petitioner and Appellant,
vs.
BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. McDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A

Statement of Facts

The petition for writ of certiorari herein asks review of a judgment by the Supreme Court of the

State of California affirming judgment by the Superior Court in and for the County of Los Angeles. The Superior Court had denied Dant & Russell's petition for writ of mandate to compel respondent county officers to cancel an assessment of certain of its property. Respondents demurred to the petition. The demurrer was sustained and judgment was rendered refusing the writ. The Supreme Court of the State affirmed that judgment. Petitioner then filed this petition for writ of certiorari.

In considering this petition for certiorari this Honorable Court need not consider either of the two constitutional questions which petitioner has argued in its brief. The controlling consideration herein on the question whether the writ should issue need not concern the opinion of the State Supreme Court (nor its declaration as basis therefor that the Philippine Islands are not a foreign country under the imports clause of the constitution), nor concern as further possible basis for support of the opinion the question as to the liability to state taxation of mere portions and remnants of an importation remaining after portions of the import have been sold, and such remnants and remaining portions now themselves as well offered for sale. The question for consideration upon this petition for writ of certiorari, instead, is merely whether the state court should have granted the petition to compel respondent officers to cancel the assessment. Answer to that question depends on whether the petition for the

writ stated facts within and showed conformity to the requirement of a state statute such as to authorize and require the cancellation sought.

Petitioner's contention, of course, is that the assessment should have been cancelled pursuant to prayer of the application declared on and denied by respondent Board of Supervisors. Respondents on the other hand respectfully submit that even without going into any suggested federal question, denial of the writ of mandate was required under the law. Even independent of any determination of the constitutional points, the judgment of the California Court was sound. Under the statute, upon the facts as shown of record, cancellation could not have been ordered.

The petition for the writ of mandate recites "that on or about the 15th day of November, 1939, petitioner . . . did file with the defendant, J. H. O'Connor, County Counsel of the County of Los Angeles," what the petition herein styles "its duly verified petition in writing," together with two supporting affidavits (R. 5), copies thereof attached thereto (Ib., 8-10); and that petitioner "did request the said defendant, J. H. O'Connor to consent to said cancellation" (R. 5); but that he refused to consent and that the Board denied the petition (R. 6); that the Board's action was based alone on said "verified petition in writing" and said attached affidavits, without other showing or evidence.

Thereafter the action was filed praying mandate to compel the cancellation.

B

Position of Respondents

Petitioner's action in the state courts sought by mandamus to compel respondent public officers to consent to the cancellation of and to cancel a certain assessment. California statute does authorize the cancellation of an uncollected tax or assessment under certain prescribed conditions. Petitioner, however, never requested the cancellation. (In this, as in any other recital of fact herein, we only recite the facts as we have them from petitioner itself. Our recitals do not purport to be of matter *in pais* but only upon the record as petitioner has made it and here presented it. Such only is our factual presentation, i. e., we attempt to present and analyze the facts only as shown of record—otherwise we make no representation of fact.)

Moreover, the conditions prescribed for cancellation did not exist. Consideration of the provisions of the California statute will indicate that the cancellation could not have been made, and that the California courts necessarily and soundly refused the writ to compel it, and that this petition for writ of certiorari now, too, must be denied by this Honorable Court.

The writ of mandate was rightfully refused and the judgment of the California court was sound for the following reasons, to wit:

(1) Petitioner never requested cancellation of assessment or taxes.

(2) The petition did not show the situation prescribed for cancellation, viz, "uncollected" taxes. It showed, instead the taxes already discharged and paid.

(3) The petition failed to recite any of the grounds for cancellation prescribed by the statute.

(4) Petitioner upon presenting its petition before the Board failed to comply with the statute requirement of proof to support the petition.

C

Argument

I.

The Writ of Mandamus was Rightfully Refused: The Petition to Cancel Submitted to the County Counsel and Denied by the Board Could Have Been Granted Only if it Complied with the Requiremnts of Statute.

The act which petitioner sought to compel by writ of the California courts was cancellation by respondent public officers of a certain assessment. Petitioner sought by mandamus to compel performance of alleged duty to cancel. To justify the mandate sought petitioner must show that cancellation was respondent officers' duty under California statute. The statute in question is Section 3804a of the Political Code of the State. Respondents agree with us as to the statute

involved. The petition for writ of mandate itself cites the controlling statute; e. g., recites "that on or about the 15th day of November, 1939, pursuant to the provisions of *Section 3804a of the Political Code* of the State of California, petitioner did file with the defendant, J. H. O'Connor, County Counsel of the County of Los Angeles, State of California, and legal advisor of the Board of Supervisors of said County, its duly verified petition in writing . . . as required and provided in the aforesaid provisions of *Political Code Seeton 3804a.*" (R. 5-6.) In closing, the petition prays the mandate of the California Court commanding that:

> "(a) The Board of Supervisors . . . forthwith order, pursuant to the provisions of *Section 3804a of the Political Code* of the State of California, the cancellation of the aforesaid illegal and erroneous assessment, as being erroneous and illegal; . . . " (R. 7.)

That statute, so far as here material, reads as follows:

> "Any uncollected tax, or assessment, or portion thereof, or penalty or costs thereon, heretofore or hereafter assessed, charged or levied more than once, or erroneously or illegally, or upon that portion of an assessment found to be in excess of the actual cash value of the property assessed, by reason of a clerical error of the assessor, or upon an assessment for improvements on land when such improvements did not in fact exist at the

time said tax or assessment became a lien, or upon an assessment of property which after the time said tax or assessment became a lien was acquired and owned by the state, or by any county, city and county, municipal corporation, school district or other political subdivision and which, because of such public ownership, is not subject to sale for delinquent taxes, may, upon satisfactory proof thereof, be cancelled by the officer having custody of the record thereof upon the order of the board of supervisors, or other governing board with the written consent of the district attorney, city attorney or legal advisor of said board, . . . "
(*Pol. Code*, Sec. 3804a.)

The cancellation which petitioner desired would constitute striking an item from the assessment roll of the County of Los Angeles. It would constitute alteration of a public record. Alteration of a public record, except as authorized by law, is forbidden as a public offense and punishable as a felony. The Penal Code of California declares that:

"Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprison-

ment in the state prison not less than one nor more than fourteen years." (*Penal Code*, Sec. 113.)

The public officer's entire innocence of wrong intent or his entire good faith in making an interdicted alteration would constitute no defense. (*People v. Johnson*, 14 Cal. App. (2d) 373.)

II.

The Writ of Mandamus was Rightfully Refused: Petitioner Never Requested the Cancellation

Petitioner, by petition to the California courts, sought their mandate to compel cancellation of a certain assessment. Therein, however, petitioner was seeking to compel something which petitioner had never requested. Petitioner had never requested the act which it sought to compel. The petition for writ of mandate alleges only that "petitioner did file with the defendant J. H. O'Connor . . . its duly verified petition . . . and did request the said defendant J. H. O'Connor . . . to consent to said cancellation. . . . " (R. 5.) The petition does not allege that petitioner ever requested cancellation of the Board. The only recital with regard to the Board is that "said petition was by defendant Board . . . denied." (R. 6.) The request was made by "duly verified petition." But upon inspection of the "duly verified petition" we see that it requested neither cancellation nor consent to cancellation. The petition for mandate does not allege that cancellation was re-

quested; and, in fact, no such request was made by the "duly verified petition."

Although the petition for the writ of mandate *does* make an allegation as to the County Counsel and does in terms allege that petitioner requested the County Counsel to consent to cancellation, that allegation is explained and modified by an exhibit attached to the petition. That general allegation is made specific and is clarified, and precisely what the pleader means is shown by reading further. The request was made in writing; the writing is attached; and inspection thereof shows that the request was not indeed for cancellation or for consent to cancellation, but, instead, was request for tax refund. The pleader's conclusion in general language that petitioner requested the County Counsel to consent to cancellation is refuted by the exhibit attached, which makes definite the general allegation and shows that the request was for a refund. An exhibit attached to a pleading may modify its recitals and qualify its general language. It may constitute the recitals in the pleading mere pleader's conclusions, and not factual recitals, and show what were indeed the facts. (*Baudini Estate Co. v. Payne*, 10 Cal. App. (2d) 623; *Rittersbacher v. Board of Supervisors*, 220 Cal. 535; *Natl. Paving Corp. v. Hutchinson*, 132 Cal. App. 235; *Peak v. Republic Truck Sales Corp.*, 194 Cal. 782; *Botsford v. Levy & Zentner*, 123 Cal. App. 204, 209.)

Petitioner attached to its petition for writ of mandate the application which the Board denied. That attached application is not a petition for cancellation, but, instead, is a claim for refund of taxes. (R. 8.) In no particular is it a cancellation petition. Entitled a claim "For *Refund* Excess Taxes Paid," it identifies the assessment of petitioner's property and specifically asks "*refund* of tax paid by claimant on hardwood lumber. . . . " It states the assessed valuation and the amount of the "taxes *paid*" thereon, repeats statement of the amount of such tax, and again recites that amount as the "amount of *claim.*" The subjoined verification of the Secretary of petitioner corporation swears to the truth of the items and statements and that "the amount therein is justly *due* this claimant, and that the same is presented within three years after the said *claim* has accrued." (R. 8-9.) To such refund claim (not cancellation application) is attached an affidavit by Thomas W. Dant, Assistant Secretary of petitioner corporation. Such affidavit recites that petitioner is an Oregon corporation and imports Philippine mahogany from the Philippine Islands; has in the yard of Cadwallader-Gibson Company, Inc., in the City of Long Beach, County of Los Angeles, a quantity thereof in the same shape and condition as when imported; that none of it is sold in the State of California and will finally all be shipped out of California. (R. 9.) The affidavit of Roy Barto, President of Cadwallader-Gibson Company, Inc., recites maintenance of its lumber yard in Long Beach,

California, and storage and handling therein of Philippine lumber for petitioner under express condition that petitioner not sell the lumber within the State of California, and affiant's belief of petitioner's compliance therewith.

Not only was there no cancellation application, but only a refund claim—it was a claim only with regard to the 1938 taxes; as to the 1939 taxes there was no claim whatever. That is to say, the petition for writ of mandate recited assessment and tax of petitioner's lumber for the two years 1938-9 and 1939-40. (R. 3, par. III.) Thereafter the reference by the petition for writ of mandate is merely to the "assessment," i. e., "that such assessment is and was erroneous and illegal" (R. 3, par. IV), and prayer that the Board order the cancellation of "the aforesaid assessment" (R. 7), and that the County Counsel consent in writing to the cancellation of "the aforesaid assessment." (R. 7.) The refund claim (not cancellation application) to the Board is with regard to the 1938 tax only. It makes no reference to the tax of 1939 or any other year.

The refund claim (not cancellation application) and supporting affidavits did not request cancellation or consent to cancellation of any tax or assessment. It imposed on such officers no duty as to cancellation and necessarily afforded no basis for seeking from the court mandamus to compel them to cancel. The situation then is that petitioner went to court and petitioned

for a writ to compel the Board to do something that the Board has never been asked to do and had been given no opportunity to do. How allege a duty or nonperformance of duty! The state courts of necessity were bound to refuse the writ.

III.

The Writ of Mandamus was Rightfully Refused: The Petition for Cancellation Itself Alleges that the Tax Has Been Paid and Asks Its Refund.

The cancellation was sought under California statute. The question whether the petitioner complied with the requirements of the statute, and whether petitioner entitled itself to the relief which it sought by mandate to compel, must be answered by referring to the petition to the California court and the facts as therein shown. Respondents demurred to said petition and admitted the facts therein well pleaded. The statute, as herein above quoted (pp. 6-7), authorizes cancellation of an "*uncollected*" tax and only upon the grounds therein recited.

The situation in which the California statute authorizes the cancellation of a tax or assessment is if it is "uncollected". The petition submitted to the County Counsel and denied by the Board of Supervisors, however, was not a petition with reference to an "uncollected" tax. It was, instead, as entitled, a claim "For Refund Excess Taxes Paid." (R. 8.) As indicated under last preceding point II herein, the application

was for refund—not for cancellations, and, as already noticed, its recitals were that the taxes had been *paid.* Clearly, the claim presented to the Board did not ask for cancellation but for refund, and, in support thereof, recited *payment* of the taxes.

The present petition for writ of certiorari, personally verified by both of the individual counsel for petitioner (Pet. 12-13), as well, recites payment of the taxes in question. Therein we read that "Petitioner *paid* taxes on these assessments respectively of $276.43 and $521.20, a total of $797.63." (Pet. 3.) And again, that "in its petition for the writ petitioner alleges that its property, to wit, the taxes *paid,* was taken without due process of law. . . . " (Pet. 4.) Under heading, "The questions presented," the petitioner similarly asks:

> "Third: Were the taxes *exacted by and received by the County* under the guise of its statutory lien taken without due process of law?" (Pet. 5.)

Again, the petition recites:

> "Petitioner *paid,* in order to release from sale, total taxes of $797.63." (Pet. 6.)

Petitioner's brief, as well as its petition, construes its petition as showing a situation of taxes paid. Therein counsel says:

> "(2) In its petition for the writ petitioner alleges that its property, to wit, the taxes *paid,* was

taken without due process of law. . . . " (Pet. & Br. 17.) (*Our Emphasis.*)

The writ of mandate sought cancellation with regard to taxes already paid. The situation shown and now argued necessarily places the case outside the statute affording relief only as to an "uncollected" tax or assessment.

Petitioner has misconceived its remedy. Petitioner's remedy, if any, was not to seek from respondent County Counsel consent to, and from respondent Board an order for, the cancellation of taxes. The taxes were already discharged by reason of payment. Petitioner's remedy, if any, instead, was suit for recovery of the taxes paid, provided such suit lay, because of taxes paid involuntarily and under duress, or because refundable under possible statutory authority. If then, under California law, remedy lay for taxes paid either for involuntary payment or under statutory authority, the remedy would lie only if the facts presented a case authorizing the same.

IV.

The Writ of Mandate was Rightfully Refused: The Petition Recited None of the Statutory Prescribed Grounds for Cancellation.

Cancellation upon proper petition is authorized only upon some one or more of the grounds prescribed by the statute, to wit, (1) if assessed or levied more than once; or (2) if assessed erroneously or illegally; or

(3) if assessed above the actual cash value by clerical error; or (4) if an assessment of non-existent improvements; or (5) if acquired by the government after assessment. Petitioner's "duly verified petition in writing" attached to the petition for writ of mandate (R. 8) attempts to set up or even suggests not one of the prescribed grounds for cancellation.

Petitioner's "duly verified petition" to the Board not only recited a situation affirmatively outside the statute (taxes *paid* rather than "uncollected"), it did not mitigate such affirmatively disqualifying recital by reciting any ground of cancellation within the statute.

V.

The Writ of Mandamus was Rightfully Refused: Noncompliance with the Statute's Requirement of Proof to Support the Petition for Cancellation Required Its Rejection and Precluded Mandamus to Compel Its Allowance.

The statute authorizes cancellation only under some one of the prescribed circumstances and only "upon satisfactory proof thereof." Not only did petitioner fail to request cancellation—petitioner failed also to offer "satisfactory (or any) proof" of any ground for cancellation. The petition for writ of mandate specifically recites instead want of any proof. It says of the Board's action in denying its application:

> "That the aforesaid action of the Board of Supervisors of the County of Los Angeles, and the Sup-

> ervisors, as members of said Board, was without any other evidence oral or written, before said Board, except as contained in said petition and in said affidavits attached thereto." (R. 6.)

In other words, petitioner did not offer the prescribed "satisfactory (or any) proof" to the Board of Supervisors to substantiate a request for cancellation. And neither the refund claim nor the affidavits attached thereto afford any aid.

The petition for writ of mandamus specifically and affirmatively alleges presentation of no evidence, oral or written, before the Board (except the petition itself and the attached affidavits). The want of such proof was and could only be fatal to the petition and thereafter fatal to the application for mandamus to compel the Board to grant the petition, and now finally be fatal to this petition for writ of certiorari.

D

Conclusion

The writ of certiorari herein sought should be denied. The ruling by the California Superior Court, thereafter affirmed by the California Supreme Court, denying the writ of mandamus, was the proper and necessary determination. The cancellation sought to be compelled was never requested, and the factual situation shown of record was outside the statutory remedy. The cancellation might not legally be made under the

statute or have been ordered by the California courts; and we respectfully submit certiorari should be denied.

Respectfully submitted,

J. H. O'CONNOR,
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and as Counsel for Respondents.

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Of Counsel.